No. 297

In the Supreme Court of the United States

October Term, 1957

WALTER J. MILLER, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (Pet. 14-19) is reported in 242 F. 2d 392. The United States District Court for the Northern District of Ohio did not render an opinion.

JURISDICTION

The judgment of the court of appeals was entered on March 22, 1957. The time for filing a petition for certiorari was extended to July 20, 1957. The petition for certiorari was filed on July 19, 1957. The

jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was improperly denied a jury trial.

2. Whether the civil penalties provided for by the Agricultural Adjustment Act of 1938 for wheat produced on acreage in excess of a farm's wheat acreage allotment are constitutional as applied to excess production of a farmer who has not accepted any benefits under that Act and has not marketed any of his wheat in interstate commerce.[1]

STATUTE INVOLVED

Certain provisions of Sections 340, 375 and 376 of the Agricultural Adjustment Act of 1938, as amended, are set forth in the petition for certiorari (Pet. 3-8). The following provisions of Sections 363, 365, and 367 of said Act, as amended (respectively 7 U.S.C. 1363, 7 U.S.C. 1365, and 7 U.S.C. 1367), may also be relevant:

> Sec. 363. Any farmer who is dissatisfied with his farm marketing quota may, within fifteen days after mailing to him of notice as provided in section 362, have such quota reviewed by a

[1] The petition also presents the question: "Is a wheat penalty, as such, when sought by court proceedings a 'forfeiture of property' as set forth in Rule 81 of the Federal Rules of Civil Procedure?" We believe this question requires no detailed consideration since the petition makes no attempt to show that it was erroneously decided, and since it is fully answered in the opinion of the court of appeals (Pet. 15-17).

local review committee composed of three farmers from the same or nearby counties appointed by the Secretary. * * * Unless application for review is made within such period, the original determination of the farm marketing quota shall be final.

Sec. 365. If the farmer is dissatisfied with the determination of the review committee, he may, within fifteen days after a notice of such determination is mailed to him by registered mail, file a bill in equity against the review committee as defendant in the United States district court, or institute proceedings for review in any court of record of the State having general jurisdiction, sitting in the county or the district in which his farm is located, for the purpose of obtaining a review of such determination. * * *

Sec. 367. The commencement of judicial proceedings under this Part shall not, unless specifically ordered by the court, operate as a stay of the review committee's determination. Notwithstanding any other provision of law, the jurisdiction conferred by this Part to review the legal validity of a determination made by a review committee pursuant to this Part shall be exclusive. No court of the United States or of any State shall have jurisdiction to pass upon the legal validity of any such determination except in a proceeding under this Part.

STATEMENT

This action was instituted to recover the civil penalty imposed by the Agricultural Adjustment Act of 1938 on the petitioner's 1954 "farm marketing excess" of wheat. The complaint alleged that petitioner

had planted and harvested wheat in 1954 in excess of the wheat acreage allotment established for his farm, that he had not stored or delivered to the Secretary of Agriculture any part of such excess production, and that he had refused to pay the statutory penalty thereon amounting to $302.40 (R. 3a-6a).[2] The complaint also alleged that petitioner had not applied for a downward adjustment of his farm marketing excess or for an administrative review of the marketing quota or marketing excess determined for his farm (R. 4a-5a).

Petitioner, in his reply to interrogatories, admitted that he had received a notice of the 1954 farm marketing quota and farm marketing excess established for his farm, and that he did not after receipt of such notice apply for a review by a review committee of his farm marketing quota or farm marketing excess (Interrogatories 5, 7; R. 9a, 12a). The petitioner admitted that he had not paid the statutory penalty on such excess production, or delivered any part of such excess to the Secretary or his representative (Interrogatories 8-10, R. 9a-10a, 12a).

The district court granted the Government's motion for summary judgment, made upon the ground that there is "no genuine issue as to any material fact" (R. 14a-15a); and the court of appeals unanimously affirmed this judgment (Pet. 19).

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[2] All record references are to the appendix to petitioner's court of appeals brief.

ARGUMENT

1. The penalties imposed by the Agricultural Adjustment Act for production in excess of the marketing quota established for a farm "do not depend upon whether any part of the wheat, either within or without the quota, is sold or intended to be sold." *Wickard* v. *Filburn*, 317 U.S. 111, 119. Accordingly, petitioner's affirmative defense, that he had not marketed any part of his wheat in interstate commerce (see Pet. 13), raised an immaterial issue and laid no basis for trial by jury. Likewise, petitioner, insofar as he questioned the validity of the determination of his farm marketing quota, raised no issue proper for submission to a jury. Petitioner, having failed to pursue his administrative remedy respecting such determination, could not in the penalty suit attack the validity of the determination. See the opinion of the court below (Pet. 17-19).

2. Petitioner's principal contention is that the present case is distinguishable from *Wickard* v. *Filburn*, which upheld the constitutionality of the penalty imposed by the Agricultural Adjustment Act on wheat planted and harvested on acreage in excess of a farm's wheat acreage allotment. Petitioner urges (Pet. 11) that in *Wickard* the farmer was the moving party whereas here he is a defendant; that there the stipulated facts showed that the farmer sold part of his wheat and fed part of it to livestock, some of which was sold; and that there the farmer had previously accepted benefits under the Act.

The decision in *Wickard* did not rest to any degree on the factors urged as grounds of distinction. The

procedural basis of the proceeding was not deemed to limit the scope of the constitutional issues presented, the Court's opinion does not even mention past acceptance of benefits under the Act, and the actual disposition made of the crop was treated as irrelevant.[3]

There plainly is no valid distinction between the present case and *Wickard*, in view of the basis on which the Court there considered and decided constitutionality. The basis was that the quota fixed by the Agricultural Adjustment Act includes all the crop that the farmer may harvest, either "for sale or for his own farm needs," and that excess production "may neither be disposed of nor used" except on payment of the statutory penalty or by meeting the requirements of the Act as to storage or delivery to the Secretary of Agriculture. 317 U.S. 119.

The broad grounds upon which constitutionality was upheld were that Congress, under its commerce power, may regulate activity "if it exerts a substantial economic effect on interstate commerce" (*id.* 125); that a primary statutory purpose was to increase the market price of wheat, "and to that end to limit the volume thereof that could affect the market" (*id.* 128); that consumption on the farm has "a substantial influence on price and market conditions" because wheat so used supplies a need "which would otherwise be reflected by purchases in the open mar-

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[3] The facts before the Court respecting disposition related merely to what had been the farmer's "practice"; the Court said: "The intended disposition of the crop here involved has not been expressly stated." 317 U.S. 114.

ket" (*ibid.*); and that the fact that the production of a particular farmer "may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial" (*id.* 127-128).

At the 1956 Term, this Court denied a petition for a writ of certiorari which asked the Court to overrule *Wickard* v. *Filburn*. *Mumma* v. *United States*, 352 U.S. 1003.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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